IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 25, 2006 Session

STATE OF TENNESSEE v. JOHN C. KERSEY

Direct Appeal from the Circuit Court for Rutherford County
No. M-55695 James K. Clayton, Jr., Judge

No. M2005-01653-CCA-R3-CD - Filed July 7, 2006

Defendant, John C. Kersey, was issued a citation for speeding and found guilty in the Rutherford County General Sessions Court. On appeal to the circuit court, the trial court, sitting without a jury, found Defendant guilty of violating Tennessee Code Annotated section 55-8-152, a Class C misdemeanor, and ordered Defendant to pay a fine of $25.00 and court costs. In his appeal, Defendant argues that (1) the evidence is insufficient to support his conviction under the facts presented in this case; (2) the trial court erred in ruling the dispatcher's tape inadmissible under relevancy grounds; and (3) the trial court erred in not issuing a bench warrant for the arrest of Deputy Jonathan Stephens as requested by Defendant. After a thorough review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3, Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

John C. Kersey, Smyrna, Tennessee, *pro se*.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; Thomas S. Santel, Jr., Assistant District Attorney General; and Trevor H. Lynch, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Deputy Jonathan Stephens, with the Rutherford County Sheriff's Department, was dispatched to mile marker seventy-one on Interstate 24 in response to a report of a vehicle fire. Deputy Stephens testified that he drove west bound to mile marker sixty-six, but he did not locate the vehicle, and turned around. Deputy Stephens said that he passed Defendant at approximately mile

marker 71 while traveling east bound between eighty and eighty-five miles per hour. Defendant sped up and began following Deputy Stephens, and Deputy Stephens increased his speed to ninety miles per hour. Deputy Stephens said that the two vehicles drove at this rate of speed for approximately one mile, and during this time, Defendant's car was approximately three to five yards behind Deputy Stephens' vehicle. Deputy Stephens then slowed down and pulled into the left lane. Defendant passed Deputy Stephens' vehicle, gave him a "dirty look," and slowed down to pull into the emergency lane. Deputy Stephens followed Defendant's vehicle into the emergency lane and activated his blue lights. Deputy Stephens approached Defendant's vehicle and asked Defendant if he had reported a burning vehicle on the interstate. Deputy Stephens said that Defendant responded to his inquiry with curses and told Deputy Stephens that he was the "complainant that's complaining about you sheriff's deputies and city deputies and ambulance [sic] driving too damn fast." Deputy Stephens said that he wrote Defendant a citation for exceeding the posted speed limit. Deputy Stephens stated that he determined Defendant's speed by "pacing" him; that is, in this situation, Deputy Stephens drove ninety miles per hour for a period of time, with Defendant following him at a set distance.

On cross-examination, Deputy Stephens acknowledged that he had received a call from the dispatcher to disregard the report of the burning vehicle, but he said that he continued driving on the eastbound side of the interstate to "double check." Deputy Stephens acknowledged that he continued to drive between eighty and eighty-five miles per hour and did not activate his siren or blue lights until he pulled in behind Defendant's vehicle in the emergency lane some time later.

Defendant testified that he was driving seventy miles per hour when Deputy Stephens passed him in the left lane, and that the police vehicle's blue lights and siren were not activated. Defendant said he sped up to eighty miles per hour in order to determine Deputy Stephens' vehicle number. Defendant then increased his speed to approximately eighty-five miles per hour so that he could read the vehicle's tag number. Defendant said that Deputy Stephens observed Defendant recording his tag number and slowed down to seventy miles per hour. The two vehicles maintained that speed for approximately one-half mile. Defendant said he then pulled into the emergency lane, and Deputy Stephens followed, activating his blue lights for the first time. Defendant denied that he at any point cursed Deputy Stephens.

Defendant called Captain McCluskey as a defense witness. (The record does not reveal Captain McCluskey's first name). Captain McCluskey testified that she was the director of the communications division for the Rutherford County Sheriff's Department and supervised the dispatchers in that office. Defendant offered into evidence a copy of a tape of the dispatcher's calls regarding the report of a burned vehicle on Interstate 24 which was issued shortly before the incident at issue. The trial court ruled that the tape was inadmissible on relevancy grounds.

At the conclusion of the bench trial, the trial court found that Defendant was guilty of speeding in violation of Tennessee Code Annotated section 55-8-152, but modified the rate of Defendant's unlawful speed that was reflected on the citation from ninety miles per hour to eighty-five miles per hour.

II. Sufficiency of the Evidence

Defendant does not dispute that he exceeded the posted speed limit on the interstate. "[I]t is unlawful for any person to operate or drive a motor vehicle or a truck at a rate of speed in excess of seventy miles per hour" on the state's interstate system. T.C.A. § 55-8-112(c). Defendant submits, however, that his unlawful conduct was justifiable under Tennessee's "citizen's arrest" statute because he was attempting to identify the driver of the sheriff's patrol car, which itself was being driven in violation of the state's speed limits.

The State argues that Defendant is not entitled to the authority extended under Tennessee Code Annotated section 40-7-109 because he did not attempt to arrest Deputy Stephens. Defendant asserts that Deputy Stephens was unlawfully exceeding the posted speed limit, but he acknowledges that he "had more sense than to attempt an arrest" of Deputy Stephens. Defendant contends, however, that the comprehensiveness of the "citizen's arrest" statute includes the right of a private citizen to pursue an alleged violator of the law, even though such pursuit may cause the private citizen to temporarily breach the law.

We first address the State's suggestion in its brief that Deputy Stephens did not violate the state's speed limits because he was responding to an "emergency." The state's posted speed limits are applicable to all drivers, including those operating vehicles owned by a governmental entity. T.C.A. § 55-8-106. The driver of an "authorized emergency vehicle," however, may exceed the posted speed limit when responding to an emergency call, or when pursuing an actual or suspected violator of the law, if (1) such vehicle is making use of both its audible and its visual signals; and (2) the driver complies with his or her duty to drive with due regard for the safety of all persons. *Id*. §§ 55-8-106; 55-8-108. An "authorized emergency vehicle" includes police vehicles. *Id*. § 55-8-101(2)(A).

It has long been the rule that police vehicles are entitled to the privilege of exceeding the posted speed limit only if the driver "make[s] use of audible *and* visual signals." *Mayor and Aldermen of Town of Morristown v. Inman*, 47 Tenn. App. 685, 342 S.W.2d 71, 74 (Tenn. Ct. App. 1960) (emphasis in original). If the police officer does not activate his or her emergency equipment, then "the emergency vehicle rule does not apply," and the officer is "subject to the rules of the road and common law duties of the ordinary motorist." *Bonds v. Emerson*, 94 S.W.3d 491 (Tenn. Ct. App. 2002); s*ee also Jona McCracken, et al. v. City of Millington*, No. 02A01-9707-CV-00165, 1999 WL 142391, *5 f.n.4 (Tenn. Ct. App. Mar. 17, 1999) (Because the blue light in the police officer's private vehicle was not operating properly, the officer was not authorized under Tennessee Code Annotated section 55-8-108(c) to exceed the posted speed limit when pursuing the fleeing bank robbery suspects).

Nonetheless, we cannot accept Defendant's proposition that Deputy Stephens' conduct during the incident justifies Defendant's own unlawful conduct. As Defendant observes in his brief, Tennessee has recognized since the early 1900's a private citizen's right to make a warrantless arrest

under certain circumstances. *See* T.C.A. §§ 40-7-109 to -115; *McCaslin v. McCord*, 116 Tenn. 690, 94 S.W. 79 (1906).

A private person is statutorily authorized to arrest another without a warrant if one of the following circumstances is present:

> (1) for a public offense committed in the arresting person's presence;
>
> (2) when the person arrested has committed a felony, although not in the arresting person's presence; or
>
> (3) when a felony has been committed, and the arresting person has reasonable cause to believe that the person arrested committed it.

T.C.A. § 40-7-109(a). The private person making such an arrest must inform the arrested person of the cause thereof unless "the person is in the actual commission of the offense, or when arrested *on pursuit*." *Id.* § 40–7-111 (emphasis added). It is this phraseology that Defendant relies upon as support for his position.

Defendant analogizes his situation to that of a police officer who effectuates an arrest outside his or her jurisdiction. In these situations, our Supreme Court has concluded that a police officer is authorized to pursue an alleged perpetrator and make an arrest outside the jurisdiction of his or her law enforcement agency if the arrest is one a private citizen would be authorized to make. *State v. Johnson*, 661 S.W.2d 854, 859 (Tenn. 1983); *State v. Donnie Alfred Johnson*, No. 02C01-9707-CC-00261, 1998 WL 464898 (Tenn. Crim. App., at Jackson, Aug. 11, 1998); *State v. Horace Durham*, No. 01C01-9503-CC-00056, 1995 WL 678811 (Tenn. Crim. App., at Nashville, Nov. 16, 1995).

Even when a police officer makes an arrest outside his or her jurisdiction, however, the police officer is not relieved of the duty to activate the patrol car's emergency equipment when the vehicle leaves the officer's jurisdiction. *See, e.g. Donnie Alfred Johnson*, 1998 WL 464898, at * 1 (Police officer activated the patrol car's emergency equipment before apprehending the defendant in county outside his jurisdiction).

Defendant submits that the "citizen arrest" statute authorizes a private citizen to engage in conduct during the making of an arrest that would otherwise be unlawful. For example, a private citizen is statutorily authorized to break open an outer or inner door or window of a dwelling house to make an arrest, if the person sought to be arrested has committed a felony, the pursuing citizen has announced his or her intention to make the arrest, and the alleged felon refuses admittance. *See* T.C.A. § 40-7-112. Our Supreme Court has cautioned, however, that the "breaking and entering" provision is limited to the statutorily proscribed circumstances, and Defendant does not contend that his conduct is covered by this specific provision. *See McCaslin*, 94 S.W. at 83. Moreover, although a private citizen's authority to make a warrantless arrest may, under limited circumstances, make certain conduct lawful that would otherwise be unlawful, the statute does not authorize a private

citizen to engage *carte blanche* in conduct made unlawful by other statutory provisions. *See, Martin v. Castner-Knott Dry Goods, Co.*, 27 Tenn. App. 421, 181 S.W.2d 638, 642 (Tenn. Ct. App. 1944) (A private citizen makes or attempts to make an arrest at his own peril); *David V. Alexander, et. al. v. Beale Street Blues Company, Inc.*, 108 F. Supp. 2d 934, 946 (W.D. Tenn. 1999) (Although the officers may have taken custody of an individual pursuant to Tennessee's citizen's arrest statute, the officers were not authorized to subsequently commit a tort on the citizen in their custody). As our Supreme Court observed in *McCaslin*, "[W]e do not think it was within the contemplation of our statutes that private citizens of one county should take it upon themselves to go into other counties, without a warrant, in search of criminals, except in cases of fresh pursuit of a fleeing felon endeavoring to avoid immediate capture, in an original arrest, or on immediate pursuit after arrest and escape." *McCaslin*, 94 S.W. at 83-84. The court warned that any other view "would lead to more violence than it would suppress." *Id*. at 84.

The State's posted speed limits were enacted to prevent injuries and promote the safety of our motorists. *See* T.C.A. § 55-8-108(b)(2); *Jona McCracken, et al.*, 1999 WL 142391, *5. Thus, even when an authorized emergency vehicle has activated both its audible and visual signals as required by statute, the driver is not relieved "from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of the driver's own reckless disregard for the safety of others." T.C.A. § 55-8-108(b)(2). To accept Defendant's argument would countermine the purpose behind the legislature's enactment of posted speed limits, and extend to a private citizen an exception from the State's speed limit laws not statutorily granted to police officers in the course of their official duties, that is, the authority to engage in a high speed pursuit of an alleged violator without the presence of both visible and audible signals. Based on the foregoing, Defendant is not entitled to relief on this issue.

III. Admissibility of Dispatcher's Tape

Defendant argues that the trial court erred in prohibiting him from introducing the dispatcher's tape reflecting her conversation with Deputy Stephens concerning the report of a burning vehicle on Interstate 24. Defendant contends that he should have been permitted to impeach Deputy Stephens' credibility with the tape pursuant to Rule 607 and Rule 613 of the Tennessee Rules of Evidence.

Impeachment evidence, like any evidence, must be relevant. *State v. Leach*, 148 S.W.3d 42, 56 (Tenn. 2004). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Thus, "[i]mpeachment by extrinsic evidence as contemplated by Rule 613 must relate to facts relevant to a material issue at trial." *Leach*, 148 S.W.3d at 56. Questions regarding the relevancy of evidence are entrusted to the sound discretion of the trial court, and a trial court's ruling on evidence will be disturbed only upon a clear showing of abuse of discretion. *State v. Robinson*, 146 S.W.3d 469, 490 (Tenn.2004).

As noted above, Defendant had two issues which were material to his proffered defense – whether Deputy Stephens was exceeding the posted speed limit, and whether or not Deputy Stephens activated his audio and visual signals while doing so. Deputy Stephens acknowledged that he was driving in excess of eighty miles per hour, and that the emergency equipment on his vehicle was not activated. The fact that Deputy Stephens may or may not have been responding to the dispatcher's report of a burning vehicle is not relevant to Defendant's argument. Thus, we find that the trial court did not abuse its discretion in finding that the dispatcher's tape was inadmissible on relevancy grounds. Defendant is not entitled to relief on this issue.

IV. Issuance of Arrest Warrant or Criminal Summons

At the conclusion of the trial, Defendant requested the trial court to issue an arrest warrant or a criminal summons against Deputy Stephens based on the testimony present at trial. The trial court refused to do so, and Defendant appeals the trial court's action. Defendant acknowledges that he has not complied with the procedural requirements required for issuance of a criminal summons or arrest warrant but argues that, assuming he did so, the trial court should have issued the criminal summons. *See* T.C.A. §§ 40-6-203 to -205.

Rule 3(b) of the Tennessee Rules of Appellate Procedure enumerates the judgments from which a defendant may appeal as of right, and include a judgment of conviction, a judgment of sentence, an order denying or revoking probation, or a final judgment in a criminal contempt, habeas corpus, extradition or post-convictions proceeding. Accordingly, Defendant's issue cannot be appealed pursuant to Rule 3(b) of the Tennessee Rules of Appellate Procedure.

CONCLUSION

After a thorough review of the record, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE